80-1335

Office-Supreme Court, U.S.
FILED
FEB 5 1981
ALEXANDER L. STEVAS,
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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 5, 1981

QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its powers of appellate review when it arbitrarily disregarded the instructions given to the jury and the special findings made by the jury and reversed and remanded for findings which the jury had already made?

2. Whether the jury's special findings that the bad faith acts of each of the individual respondents, municipal employees, caused their municipal employer to deprive petitioner of his constitutionally protected rights were sufficient to impose personal liability on such employees under 42 U.S.C. § 1983?

3. Whether this Court's decision in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), mandated affirmance of the judgment below as against respondent Board of Higher Education?

THE PARTIES

Petitioner Michael I. Selzer was the plaintiff in the District Court and the appellee in the Court of Appeals.

Respondents Morton Berkowitz, Michael Kahan, Philippa Strum, Herbert Weiss, Ellen Frey-Wouters, Robert Engler and the Board of Higher Education of the City of New York* were defendants in the District Court and appellants in the Court of Appeals. Other defendants in the District Court included Martin Fleisher, David W. Abbott, Nathan Schmukler, Donald R. Reich, John W. Kneller and Robert J. Kibbee.

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* The members of the Board of Higher Education, Harold M. Jacobs, Chairman, and Edith B. Everett, Ronald T. Gault, Jack John Olivero, David Z. Robinson, Patricia Carry Stewart, Loretta A. Conway, Walter H. Crowley, Armand D'Angelo, Gurstin D. Goldin, Albert V. Maniscalco, David Valinsky, Emanuel R. Piore, Joan B. Maynard, Joaquin Rivera and Edward A. Roberts, were also named as defendants, but they were only sued in their official capacities. They were not parties to the appeal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, rendered August 6, 1980, is reported at 629 F.2d 809 (2d Cir. 1980) and is reproduced in the Appendix at A1.[1] The opinion of the District Court denying respondents' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial and awarding attorneys' fees and disbursements, is reported at 477 F. Supp. 686 (E.D.N.Y. 1979) and is reproduced in the Appendix at A28. Another opinion of the District Court, not relevant to this petition, denied respondents' motion to dismiss claims asserted under

1. Page references to the Appendix to this Petition are cited as "A ."

42 U.S.C. §§ 1985(3) and 1986 and is reported at 459 F. F. Supp. 347 (E.D.N.Y. 1978).

JURISDICTION

The judgment of the Court of Appeals was set forth in its opinion filed on August 6, 1980. (A1) Timely petitions for rehearing were filed by both petitioner and respondents. Those petitions were denied in an order entered on November 7, 1980. (A45) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the interpretation and application of 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

After permitting himself to be debriefed by the CIA, petitioner, Professor Michael Selzer, who had previously been recommended for a promotion by his colleagues, found that they had withdrawn that recommendation and now also opposed his application for tenure. He brought suit against the Board of Higher Education of the City of

New York and twelve of his faculty colleagues under the provisions of 42 U.S.C. § 1983.

Trial was before a judge and jury in the United States District Court for the Eastern District of New York and lasted nine weeks, including some three and a half days of jury deliberation. Responding to written interrogatories, the jury rendered a decision in favor of plaintiff holding six of the twelve individual defendants liable. Liability as to the Board of Higher Education was not permitted by the trial court to be placed before the jury. The Board of Higher Education agreed, however, to be substituted as judgment debtor[2], and it and the individual defendants found liable appealed to the Court of Appeals for the Second Circuit.

On August 6, 1980, the Court of Appeals, in an opinion written by District Judge Lasker (S.D.N.Y.) (sitting by designation) and concurred in by Judge Timbers, reversed and remanded the matter for a new trial. Chief Judge Kaufman concurred in the reversal but dissented from the remand, saying the complaint should have been dismissed on the grounds that "Brooklyn College was seeking a teacher and a scholar, not an espionage agent" (A17), and that whatever Selzer's First Amendment rights might have been in another context, in the context of Brooklyn College his exercise of those rights had been "inherently disruptive." (A18)

A. Summary of the Pertinent Facts

Petitioner Michael I. Selzer was an Assistant Professor in the Department of Political Science at Brooklyn College, which is a part of the City University of New York ("CUNY"). Each of the individual respondents was a

2. On July 1, 1979, the Board of Higher Education's name was changed to "City University of New York" as a part of the "takeover" of the City University by New York State. N.Y. Educ. L. § 6203 (McKinney supp. 1980-81). The stipulation reflects that change of name. (A42) The takeover does not otherwise affect the instant proceeding. N.Y. Educ. L. § 6225 (McKinney supp. 1980-81).

faculty member in the same Department of Political Science.

Respondent Board of Higher Education of the City of New York ("BHE") was a municipal agency charged with the administration of CUNY. BHE's functions included the adoption of procedures and the making of decisions as to tenure and promotion for CUNY faculty members. Under the BHE's procedures, the president of each CUNY college had the power to render a final negative decision on tenure and promotion, in which case the issue never reached the Board of Higher Education.

In the Spring of 1976, Selzer had been a candidate for promotion to the rank of Associate Professor. At that time each of the individual respondents (possibly excepting Engler) enthusiastically supported his candidacy. The Department's affirmative recommendation was forwarded to other committees involved in the promotion process. Indeed, petitioner's candidacy was doing very well, notwithstanding that the recommendation was unusual because Dr. Selzer was not yet tenured, a question due to arise in the following (1976-1977) academic year.

That same Spring of 1976, Dr. Selzer, whose specialty was psycho-politics, had been seeking to obtain research data on terrorists and their psychological makeup from the CIA. He was turned down, but the CIA, upon learning that he was soon going abroad (Western Europe), asked if Dr. Selzer would report back later on any information of a "military, scientific, technical and economic and political" nature (Tr. 625) which might be useful. Selzer did not agree to do so but did agree to think about it.

The thoughts which went through Selzer's mind included a deep sense of gratitude and loyalty to the United States, his adopted country. On the other hand, he was familiar with the excesses attributed to the CIA.

After he returned from Europe in August, Selzer telephoned the CIA, saying he thought he had nothing of

significance to report, and that what he had to say didn't warrant a face-to-face meeting. This telephone conversation lasted less than fifteen minutes. Indeed, Selzer had no information of value, and the CIA representative testified that no record of the substance of the conversation had been kept. (Tr. 147-151; 627-630) Neither the CIA nor Dr. Selzer pursued the matter further.

Dr. Selzer's attitude toward his civic duties was unfortunately very different from that of certain, at least, of his colleagues at Brooklyn College. Perhaps indiscreetly, he confided in his brother-in-law, respondent Michael Kahan. Kahan was also a member of the Political Science Department and also a candidate for tenure that year—the only other candidate in the Department.

Kahan expressed sharp disagreement with Selzer, but he opined it was Selzer's own business and agreed to keep the matter to himself.

On November 15, 1976, however, Kahan reported the matter to respondents Morton Berkowitz, Chairman of the Department, and Philippa Strum, another influential Department member. Kahan, Berkowitz and Strum were three of the five members of the Department's "Appointments Committee," the committee responsible for making Departmental recommendations on tenure, and they decided that the matter should be taken up by that Committee.

On December 6th, respondents Berkowitz and Kahan, respondent Ellen Frey-Wouters, and defendant Martin Fleisher (a Department member whom the jury determined had acted in good faith), acting as the Appointments Committee, summoned Dr. Selzer to appear before them for purposes of considering his tenure application. (Strum was in the hospital but had helped to arrange the meeting.) Rather than discuss with him his academic credentials, as he had anticipated, they interrogated Selzer about being a

spy. Selzer challenged the group on the relevancy of that issue to the question of his tenure, and he declined to answer their questions.

At meetings of the entire Department of Political Science held on December 15 and 20, 1976, respondents took various positions regarding what action Brooklyn College should take. It was finally resolved that Berkowitz, as Department Chairman, should appoint an Ad Hoc Committee of Department members to study the matter. The committee he appointed was chaired by respondent Strum, and its members included respondent Robert Engler. Over the Christmas recess, the Ad Hoc Committee held two meetings. Selzer requested in writing that the Committee permit him to appear to learn what it was he was accused of and to give him the opportunity to be heard in reply. (Tr. 266-268) The Committee refused.

On January 12, 1977 the Ad Hoc Committee rendered its report at a meeting of the full Department. The report concluded that Selzer's "actions warrant dismissal from the College." Spurred on by Engler and respondent Herbert Weiss, the Department adopted, with minor amendments, the Ad Hoc Committee's report as its own and immediately delivered it, as such, to the office of John Kneller, President of the college. President Kneller and members of the press, whom he had summoned in anticipation of the report, were waiting. The President then issued his own press release with a copy of the Department's recommendation attached to it. (Plaintiff's Exhibit 30)

The effect of the press coverage was almost immediate. Whereas one week before (on January 5, 1977) the subcommittee of the College Review Committee ("CRC") (the next to last rung of the heirarchical ladder responsible for recommendations on promotion) had found Selzer to be "clearly qualified", five days after public release of the Department's recommendation the full CRC, including all 5 of the members of its subcommittee, voted 9 to 1 against Selzer's promotion.

During January and February, respondents Kahan, Strum and Weiss wrote and telephoned faculty members at other universities, urging them to write to President Kneller in support of the efforts to have Selzer dismissed. A number of those contacted did as requested.

In February, Kneller had two Department recommendations before him for consideration. The first recommendation, stemming from the prior Spring, was to promote Selzer. The second and more current one was to fire him. On February 18, 1977, Kneller announced that he would not recommend Selzer for promotion, and that matter was therefore never forwarded to the BHE.

Throughout the Spring, the Appointments Committee continued the formalities of its consideration of Selzer's application for tenure. In accordance with custom, the Committee asked Selzer to suggest potential outside evaluators for his work. All of Selzer's suggestions were rejected. Selzer also learned that student evaluations of his teaching, which had been in the custody of respondent Kahan, had disappeared.

On April 21, 1977, President Kneller issued a press release criticizing both the Department and Selzer, but he determined that disciplinary proceedings against Selzer were not warranted.

The Department was outraged. At its April 27, 1977 meeting it resolved that Berkowitz should form a committee to draft a Departmental statement criticizing Kneller's decision. Later that same day, Berkowitz designated himself as the person to critique Selzer's teaching for that year. He audited one of Selzer's classes and proceeded to write and to place in Selzer's personnel file the only negative teaching evaluation Selzer ever received.

A week later, the Appointments Committee met to vote on tenure for Selzer and Kahan. Respondents Berkowitz, Strum and Frey-Wouters (and defendant Fleisher) voted 4-0 to deny tenure to Selzer and 4-0 to grant tenure to

Kahan. (Kahan, although a member of the Appointments Committee, tastefully was not present.) Shortly thereafter, the Department's Promotion Committee met to consider Selzer's renewed application for promotion. That Committee voted 8-1 against. Although each of them, possibly excepting Engler, had voted in favor of his promotion in 1976, respondents Berkowitz, Kahan, Weiss and Engler all voted against Selzer's promotion this time. Respondents Strum and Frey-Wouters were absent from the meeting.

In addition to the negative teaching evaluation, Berkowitz composed strongly negative Chairman's Reports on both the tenure and promotion questions.[3]

The Appointments and Promotion Committees' negative votes and the negative Chairman's Reports became part of the permanent files on Professor Selzer that travelled to all subsequent committees involved in the tenure and promotion processes and to the President of the college. The tenure file, as it was passed along, did not include various appropriate materials supportive of Selzer's candidacies which had been submitted to Berkowitz for inclusion.

When Selzer's application for promotion got to one of the other committees involved in the promotion process (the Personnel and Budget Subcommittee) in October, 1977, respondent Engler, a member of that committee, raised the CIA matter in case the other subcommittee members, who were not members of the Political Science Department, had overlooked or forgotten that issue.

Selzer's 1977 candidacy for tenure was not recommended favorably by other committees above the Department level and was finally rejected by President Kneller in October, 1977 and January, 1978. Because tenure was denied,

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3. These reports were in sharp contrast to Berkowitz' laudatory Chairman's Report on Selzer's promotion the prior year, in which Berkowitz had written that Selzer was "one of the most valuable members of the Department. . . . His scholarship is of the highest quality. . . . His teaching observations have been uniformly excellent. . . ."

Selzer's candidacy for promotion became moot. Neither issue reached the BHE.

B. Proceedings Below

Petitioner's verified complaint was filed in the District Court on September 13, 1977. The complaint, as amended, sought damages and injunctive relief pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986.[4] Jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343.

The trial commenced on March 19, 1979. During the trial, respondents Berkowitz, Kahan and Strum each testified that it would have been improper to take Selzer's contacts with the CIA into consideration in determining whether he should be granted promotion or tenure. At the close of the nine-week trial, the jury made the following findings of fact on special interrogatories submitted to them:[5]

> *Interrogatory 1*
>
> Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?
>
> Yes ✓ No _____
>
> *Interrogatory 2*
>
> Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?
>
> Yes _____ No ✓

4. The jury did not find facts necessary to support petitioner's claims under 42 U.S.C. §§ 1985(3) and 1986 and those causes of action were dismissed. No issue relating to those findings is raised by this petition.

5. Full texts of all of the interrogatories submitted to the jury and the jury's findings thereon are reproduced at A20.

Interrogatory 3

(a) If your answer to Interrogatory 1 is "Yes" and to Interrogatory 2 is "No", which, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation, of that result:

	Yes	No
Berkowitz	√	
Strum	√	
Frey-Wouters	√	
Fleisher	√	
Kahan	√	
Weiss	√	
Engler	√	
Abbott	√	
Schmukler	√	
Reich	√	
Kneller	√	
Kibbee	√	

(b) For each defendant, if any, with respect to whom your answer above is "Yes" please state whether that defendant has proved by a preponderance of the evidence that he(she) reasonably and in good faith believed at the time that he(she) was acting in the fulfillment of his(her) responsibility as a public school employee when he(she) took the action that he(she) did and did he(she) by a preponderance of the evidence prove that he(she) did not take any action with malicious intention to cause a

deprivation of constitutional rights or other injury to the plaintiff.

	Yes	No
Berkowitz	—	✓
Strum	—	✓
Frey-Wouters	—	✓
Fleisher	✓	—
Kahan	—	✓
Weiss	—	✓
Engler	—	✓
Abbott	✓	—
Schmukler	✓	—
Reich	✓	—
Kneller	✓	—
Kibbee	✓	—

Damages in the amount of $580,000 were awarded, jointly and severally, against respondents Berkowitz, Kahan, Strum, Frey-Wouters, Weiss and Engler. (A40)

Respondents moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Their motion was denied (A29), and an amended judgment awarding costs and attorneys' fees was entered by the District Court on October 4, 1979. (A41) On November 5, 1979, respondent BHE was substituted as the judgment debtor. (A42)

Respondents appealed to the Court of Appeals for the Second Circuit. In an opinion filed on August 6, 1980,

the Court of Appeals held that the District Court's judgment should be vacated because of the failure to instruct the jury that the principles of causation set forth in this Court's opinion in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), applied separately as to each individual defendant. Specifically, the Court of Appeals held:

> "that each defendant should have been given the opportunity to establish by a preponderence of the evidence that absent Selzer's CIA involvement that defendant would nevertheless have acted in the same way." (A12)

Both petitioner and the respondents filed timely petitions for rehearing, with suggestion for rehearing in banc. Those petitions were denied on November 7, 1980. (A45)

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Arbitrarily Disregarded The Instructions And Interrogatories Submitted To The Jury And Remanded For Findings Of Fact Which Had Already Been Made By The Jury

The Court of Appeals set aside the jury's verdict, vacated the judgment and remanded for the finding of additional facts. The basis for the reversal was a determination by the Court of Appeals that the jury had not been sufficiently charged and did not make sufficient findings with respect to the issue of whether the individual

respondents caused injury to petitioner. In so holding, the Court of Appeals' decision arbitrarily disregarded the District Court's instructions and the jury's findings on the causation issue and failed to recognize that the required charge and appropriate findings had already been made. We respectfully submit that the Court of Appeals' misreading of the record so far departed from appropriate standards for appellate review as to call for an exercise of this Court's supervisory powers. Indeed, the Court of Appeals' arbitrary decision was an abuse which only this Court can correct.

In reviewing a District Court's judgment, the Court of Appeals is required to try to harmonize all of the trial judge's instructions and the jury's special verdicts so as to support the judgment. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *see Franks* v. *United States Lines Co.*, 324 F.2d 126, 127 (2d Cir. 1963). Failure to do so "results in a collision with the seventh amendment.[6]" *Atlantic & Gulf Stevedores, supra*, 369 U.S. at 364. In the instant case, the Court of Appeals ignored the express language of the jury's findings and made no effort to assess whether those findings provided a proper basis for the judgment.

The District Court submitted the case to the jury on special interrogatories. The jury deliberated for 3½ days before returning its findings. In response to Interrogatory 1, the jury found that petitioner had proved that consideration of his protected conduct was a "substantial or motivating factor" in the decision to deny him tenure and promotion. In response to Interrogatory 2, the jury found that none of the defendants had proved that petitioner would have been denied tenure or promotion if his pro-

6. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

tected conduct had not been considered.[7] Under the test announced by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), those findings established that respondent BHE wrongfully denied tenure and promotion to petitioner and, thus, subjected him to a deprivation of his constitutional rights in violation of § 1983.

In Interrogatory 3(a) the jury was asked:

> "If your answer to Interrogatory 1 is "Yes" and to Interrogatory 2 is "No", which, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation, of that result: [a list of defendants followed]."

In addition to Interrogatory 3(a), the District Court charged the jury as follows:

> "You are instructed that plaintiff complains of being denied tenure and/or promotion because of his association with the C.I.A. For the sake of argument, without any implication to be drawn, if you do find that any of the defendants in the Political Science Department voted not to recommend tenure and/or promotion in order to punish the plaintiff for his association with the C.I.A., you must also find that his or her actions caused or contributed to plaintiff's injury, i.e., before you can find liability against these defendants, you must find that it was their actions that caused or contributed to the denial of tenure and/or promotion." (Tr. 6279-80)

The District Court also charged:

> "Although there are a great number of defendants, . . . it does not follow necessarily from that fact

7. If the defendants below, or any of them, had proved that petitioner would have been denied tenure or promotion absent consideration of his association with the CIA, that fact would necessarily have absolved all of the defendants of liability, *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), and the jury was so instructed. (Tr. 6280)

> alone that if one is liable, any other defendant is liable. Each defendant is entitled to a fair consideration of his, her or its own defense and is not to be prejudiced if you find against any of the other defendants. . . ." (Tr. 6263)

At the conclusion of the instructions on petitioner's § 1983 claims, the District Court charged:

> "I have said that the issue for you to decide is whether any or all of the defendants intentionally used and misused their positions to violate plaintiff's constitutional rights. . . ." (Tr. 6282)

After being thus instructed, the jury made separate findings on Interrogatory 3(a) that the actions of each of the individual respondents (as well as all of the other individual defendants) had caused petitioner to be denied tenure and promotion because of his association with the CIA. These findings (in the absence of proof of good faith) were sufficient to hold the individual respondents personally liable for "caus[ing petitioner] to be subjected" to a deprivation of his constitutional rights. 42 U.S.C. § 1983. *See, Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 692 (1978):

> "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort . . ."

In response to Interrogatory 3(b), the jury made separate findings for each of the individual defendants as to whether that defendant had proved that he or she had acted in good faith when he or she caused, or contributed to causing, petitioner to be deprived of his constitutional rights.[8] The jury found that six defendants had proved

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8. In connection with Interrogatory 3(b), the jury was charged:
> "Bear in mind also that the defendants are entitled to freedom from liability if they proved by a preponderance of the evidence that they acted in good faith . . ." (Tr. 6281-82)

good faith but that the other six, the respondents, had not. Thus, each of the individual respondents failed to prove that he or she was entitled to a qualified immunity from liability. *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Despite the clear and obvious meaning of the District Court's instructions and the jury's separate findings on the issue of causation, the Court of Appeals vacated the District Court's judgment, on the purported ground that "the *Mt. Healthy* rule of causation . . . cannot be satisfied by a finding as to the defendants collectively." (A12) The Court of Appeals further held that:

> "each defendant should have been given the opportunity to establish by a proponderance of the evidence that absent Selzer's CIA involvement that defendant would nevertheless have acted the same way."[9] (A12)

The Court of Appeals' conclusion that the *Mt. Healthy* rule of causation had not been applied separately to each of the individual respondents flies in the face of the instructions and interrogatories submitted to the jury and the principles of *Mt. Healthy* itself.

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9. The language of the Court of Appeals' decision is broader than the terms of the instructions and interrogatories proposed by respondents. Respondents' proposals were limited to consideration of their voting conduct. (Defendants' Exhibit 9Z) No instruction or interrogatory they proposed referred to the manner in which respondents "acted." Thus, no objection was properly preserved as to the instruction and interrogatory apparently required by the Court of Appeals. F.R.Civ.P. 51.

Furthermore, the instructions and interrogatories proposed by respondents were contrary to the evidence before the jury, which included substantial acts of a non-voting nature which the individual respondents engaged in solely as a result of Selzer's CIA involvement (e.g. the Departmental report to President Kneller calling for Selzer's dismissal because of his association with the CIA). Since respondents' proposed instructions and interrogatories would have provided them with a complete defense based solely upon the propriety of their voting conduct (and without reference to their other acts), their proposals were erroneous as a matter of law. 42 U.S.C. § 1983.

Interrogatory 3(a) required the jury to make separate findings as to each of the individual respondents. The jury's answers to that interrogatory made express findings that each of the individual respondents knowingly acted to cause, and did cause, the "result" found in their answers to Interrogatories 1 and 2, *i.e.*, that the institutional decisions to deny petitioner tenure and promotion were made because of his association with the CIA. Lest there be any doubt as to the meaning of the jury's findings in Interrogatory 3(a), those findings were made in light of an instruction which specifically referred to acts engaged in by the individual respondents "to punish [petitioner] for his association with the C.I.A." *See also* Interrogatory 8. (A26)

Part III of the Court of Appeals' decision patently ignores Interrogatory 3(a) and the instructions pertinent to it. That is the Interrogatory, of course, which inquired specifically about individual responsibility for causation. Nevertheless, the Court of Appeals ignored Interrogatory 3(a) and focused solely on Interrogatory 2, the purpose of which was only to establish the second prong of the *Mt. Healthy* test with respect to the *institutional* decision to deny tenure and promotion. The Court of Appeals' arbitrary and unexplained failure to consider the jury's findings on Interrogatory 3(a) constituted a gross abuse of its obligation to respect findings of fact made by the jury.[10]

Moreover, in light of the jury's express findings of direct causation in Interrogatory 3(a), an inferential test of causation as in *Mt. Healthy* was not necessary to establish petitioner's claims against the individual respondents. In *Mt. Healthy* this Court reversed the lower court's reinstatement of a teacher who claimed that he had been denied a renewal of his contract because he had engaged in constitutionally protected conduct. The trial court in *Mt.*

10. The Court of Appeals' failure to mention Interrogatory 3(a) in Part III of its decision is particularly puzzling in light of its references to the jury's findings on causation in Part II.

Healthy had found only that the teacher's constitutionally protected conduct had been a substantial factor in the school board's decision not to rehire him. There was no finding that consideration of that conduct had caused the deprivation of his tenure. The trial court's determination in *Mt. Healthy* was therefore remanded for determination of additional facts on the issue of causation, *viz.* whether the school board would not have renewed the teacher's contract even if it had not considered his protected conduct. In the *Selzer* case at bar, the jury found causation not only as to the institutional decision but also as to the role of each of the six respondents individually.

In the instant case, both prongs of the *Mt. Healthy* test were subsumed in the jury's findings on Interrogatory 3(a). Having determined in Interrogatories 1 and 2 that petitioner had been deprived of his constitutional rights, the jury was asked in Interrogatory 3(a) to make separate findings as to which, if any, of the listed defendants had caused "that result." The jury was not asked (as they had been in Interrogatory 1) whether Selzer's CIA association was a "substantial or motivating factor" in shaping the conduct of the individual defendants. Rather, they were asked separately to determine whether the conduct of each of the listed defendants caused or contributed to causing the deprivation of constitutional rights to which Selzer had been subjected.

The jury's determination that the actions of each of the individual respondents caused the deprivation of petitioner's constitutional rights was the only finding that had to be made on that issue. Indeed, the jury's separate findings on Interrogatory 3(a) were exactly the findings which the Court of Appeals held were required. The Court of Appeals' arbitrary action in vacating the District Court's judgment thus had no basis in fact or in law and was a gross abuse of the Court of Appeals' powers of judicial review.

The instructions and interrogatories submitted to the jury were complete and correct. The District Court did not err in refusing to grant the instruction and interrogatory referred to by the Court of Appeals. Indeed, the facts sought by the Court of Appeals were plainly on the record before it. In the interests of justice, the Court should grant certiorari in the exercise of its supervisory power over the lower federal courts. *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356 (1956).

II

The Petition Involves An Important And Unresolved Question Of Federal Law

This petition raises the important and unresolved federal question of the circumstances under which individual public employees may be held liable under 42 U.S.C. § 1983 for conduct which causes a public institution to subject another person to a deprivation of his constitutional rights. As set forth in Point I above, the jury found facts which established:

> (1) that respondent BHE deprived petitioner of tenure and promotion because he engaged in activities protected by the constitution;
>
> (2) that each of the individual respondents knowingly caused petitioner to be subjected to that deprivation of his constitutional rights; and
>
> (3) that each of the individual respondents failed to prove that he or she was entitled to a qualified immunity.

Petitioner submits that the facts found by the jury, which meet the tests enunciated by this Court in *Mt. Healthy, Monell* and *Wood, supra;* are sufficient to support

his claims against the individual respondents and represent a correct statement of the law which should be applied to claims against individuals who are alleged to have caused a public institution to subject another person to a deprivation of his constitutional rights.

III

This Court's Decision In *Owen v. City Of Independence* Requires Affirmance Of The Judgment As Against The Board Of Higher Education.[11]

The findings of the jury in response to Interrogatories 1 and 2 clearly establish that petitioner was wrongfully denied tenure and promotion. The BHE was a municipal entity at all times relevant herein. *Melani* v. *Board of Higher Education of the City of New York*, 12 Empl. Prac. Dec. (CCH) ¶ 11,068 (S.D.N.Y. 1976). In *Monell, supra*, this Court held that municipal entities, such as the BHE, could be held liable for injuries caused by official acts or policies. The mere fact that the BHE delegated its statutory responsibility to consider candidates for tenure and promotion to the presidents of the constituent institutions of CUNY does not relieve the BHE of liability if

11. Affirmance of the judgment on this ground would reverse the District Court's dismissal of § 1983 damage claims against the BHE. However, the BHE thereafter consented to the entry of judgment against it by stipulating to be substituted as judgment debtor. (A42) BHE was also an appellant in the Court of Appeals. Although petitioner filed no cross-appeal with respect to the dismissal of § 1983 claims against the BHE, no cross-appeal was necessary, because petitioner sought affirmance of a judgment which, by its terms, ran against the BHE. An appellee, as petitioner was below, is free to seek affirmance of his judgment on any ground, including a ground not considered by the District Court. *Colautti* v. *Franklin*, 439 U.S. 379, 397 n.16 (1979); *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1206 (2d Cir. 1978); *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220, 224 (2d Cir. 1974).

those decisions are wrongful.[12] *See,* Schnapper, *Civil Rights Litigation After Monell,* 79 Colum. L. Rev. 211, 217-23 (1979). The essence of a § 1983 action against a government body is an allegation that an official policy or an official act has deprived the plaintiff of rights protected by the Constitution. *See, Monell, supra,* 436 U.S. at 690. *Monell* left open, however, the issue of whether a municipal entity could invoke a qualified immunity based on the good faith of those acting on its behalf.[13] 436 U.S. at 701.

That issue was resolved in *Owen v. City of Independence,* 445 U.S. 622 (1980), decided after argument of the appeal below. In *Owen,* the Court held that a municipality could not claim immunity based on the good faith of those acting on its behalf. "[T]he Court interpret[ed] 42 U.S.C. § 1983 to impose strict liability on municipalities for constitutional violations." 445 U.S. at 658 (Powell, J., dissenting). When the Court of Appeals did not apply *Owen* in its decision below, petitioner specifically petitioned for rehearing on that issue, among others. The petition for rehearing was denied without opinion. (A45)

Petitioner submits that the jury found all of the facts necessary to hold the BHE liable for violating his constitutional rights. Thus, *Monell* and *Owen* require affirmance of the District Court's judgment as against the BHE, and the Court of Appeals should have granted the petition for rehearing to consider the effects of *Owen* on its decision.

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12. If municipalities were allowed to avoid liability under § 1983 by delegating the power to make decisions, the compensatory purposes of § 1983 would be undermined. A plaintiff who has proved that an official decision had deprived him of his constitutional rights could still be denied recovery if that decision had been delegated to another, and if the delegee had acted in good faith. Further, an incorporated entity such as a municipality cannot reach a decision except through the human agents acting on its behalf; if delegation were a defense, confusion would reign as to whether a particular decision is to be attributed to the entity itself or to a person delegated to make that decision.

13. If the defense were available in this case, the jury's finding that Brooklyn College President John Kneller had acted in good faith would immunize the BHE, since Kneller's decision was made on behalf of the BHE.

CONCLUSION

Petitioner Michael I. Selzer respectfully submits that for the reasons stated above a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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February 5, 1981

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1030—September Term, 1979

(Argued March 21, 1980 Decided August 6, 1980)

Docket No. 79-7776

MICHAEL I. SELZER,

Plaintiff-Appellee,

—against—

MARTIN FLEISHER, DAVID W. ABBOTT, NATHAN SCHMUKLER, DONALD R. REICH, JOHN W. KNELLER, and HAROLD M. JACOBS, Chairman, and EDITH B. EVERETT, RONALD T. GAULT, JACK JOHN OLIVERO, DAVID Z. ROBINSON, PATRICIA CARRY STEWART, LORETTA A. CONWAY, WALTER H. CROWLEY, ARMAND D'ANGELO, GURSTIN D. GOLDIN, ALBERT V. MANISCALCO, DAVID VALINSKY, EMANUEL R. PIORE, JOAN B. MAYNARD, JOAQUIN RIVERA and EDWARD A. ROBERTS, Members of the Board of Higher Education of the City of New York, and ROBERT J. KIBBEE, Chancellor of the City University of New York,

Defendants;

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellants.

Before:

KAUFMAN, TIMBERS, *Circuit Judges,*
and LASKER, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York, Thomas C. Platt, J., after a jury trial, finding six individual defendants liable for damages, attorneys fees and costs for violation of plaintiff's constitutional rights by voting to deny him tenure or promotion at Brooklyn College.

Judgment vacated and case remanded for new trial.

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs., New York, New York (Walter L. Stratton, Esq., G. Russell Miller, Esq., E. Lauren Holmes, Esq., Of Counsel) *for Plaintiff-Appellee.*

ALLEN G. SCHWARTZ, Corporation Counsel of the City of New York (L. Kevin

* Hon. Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Sheridan, Esq., Diane R. Eisner, Esq., Richard Bowers, Esq., Patrick F. X. Mulhearn, Esq., Peter J. Kurshan, Esq., Of Counsel) *for Defendants-Appellants.*

LASKER, D.J.

I.

During the fall of 1977, Michael Selzer, then a political science professor at Brooklyn College, was denied tenure and promotion. He brought this action against various individuals and the New York City Board of Higher Education, alleging that the defendants acted to cause the denial because of his contacts with the United States Central Intelligence Agency (CIA) in violation of his First Amendment rights of freedom of expression and association.

Selzer had been enthusiastically recommended by the appropriate committees in the political science department and the School of Social Science for promotion from Assistant to Associate Professor in the Spring of 1976. Selzer, who specializes in the area of psychopolitics and was then studying the psychology of Nazi leaders, had contacted the CIA to inquire about access to data possessed by that agency, and agreed to the CIA's request to "debrief" him after he returned from a research trip to Europe in the summer of 1976. Upon his return, in a telephone conversation which lasted ten to fifteen minutes, Selzer gave a CIA officer information as to his observations on his trip.

Selzer's action became known to other members of the political science department during the Fall of 1976

and to the press that winter. In May 1977, the Appointments Committee of the political science department voted to deny Selzer tenure, and the department's Promotions Committee, in contrast to their 1976 action, voted against his promotion. The 1977 report of the chairman of the department also recommended against granting Selzer tenure. At each level of the hierarchy of committees at Brooklyn College involved in the tenure and promotion processes, the subsequent votes were against Selzer. Finally, the President of Brooklyn College decided not to recommend to the Board of Higher Education that Selzer be tenured, thereby terminating the process.

Selzer alleged that the negative votes on his tenure and promotion candidacies were based not on his academic qualifications but on his association with the CIA, and that the individual defendants conspired to deny him tenure. The appellants claimed that they were merely expressing their views as to Selzer's involvement with the CIA and that their actions were not intended to punish him for the exercise of his First Amendment rights.

After a nine week trial the jury returned a verdict for $580,000 against six individual defendants who sat on the tenure and promotion committees of the political science department. The other defendants were found to have acted in good faith. In response to special interrogatories, the jury found that the plaintiff proved that his association with the CIA was "a substantial or motivating factor in the determination to deny [him] tenure or promotion"; that the defendants as a group had not shown that without such association Selzer would have been denied tenure or promotion; and that the six defendants-appellants who had caused or

contributed to the denial of Selzer's tenure or promotion had not acted in good faith.

After trial the district judge entered a judgment for the amount awarded by the jury together with an award of $433,458.73 in attorneys fees and expenses, and $60,065.83 in costs. The judgment was modified to substitute the Board of Higher Education as judgment debtor in lieu of the six individuals. The Board and those individuals have appealed to this Court.

II.

Appellants claim several errors below. We deal at the outset with those claims which we find without merit.

Appellants argue first that the First Amendment precludes recovery against them because the imposition of damages punishes them for engaging in what they characterize as "pure speech," that is, for merely expressing their views about Selzer's CIA involvement. This contention is based on an inaccurate characterization of the facts. The jury found appellants' conduct caused and was intended to cause the deprivation of Selzer's constitutional rights. Clearly, the First Amendment does not shield such conduct.

Appellants also contend that since the actual decision as to tenure was made by the President of Brooklyn College alone, the actions of the members of the Tenure and Promotion Committees could not have proximately caused Selzer's injury.[1] However, the jury was properly instructed as to the principles of causation and

1. It might be argued, although appellants do not, that the jury charge misstated the law as to causation by setting too low a level of proof required for liability. The jury was charged

(footnote continued on next page)

concluded that appellants' actions were a proximate cause of the denial of Selzer's tenure. There was sufficient evidence to support that finding, including the testimony as to the weight given to the votes—particularly when negative—of the Tenure and Promotion Committees of the department by those who participate in the upper levels of the multi-tiered decisionmaking at Brooklyn College. *See Haimowitz v. University of Nevada,* 579 F.2d 526, 530 (9th Cir. 1978).

Appellants claim that, as a matter of law, they are entitled to good faith immunity under *Wood v. Strickland,* 420 U.S. 308 (1975), because without any prior judicial decision holding similar conduct to be actionable, they had no reason to know that they were violating Selzer's constitutional rights. We disagree. A prior judicial decision holding conduct such as appellants' to be a basis for suit was not necessary to apprise

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"before you can find liability against these defendants, you must find that it was their actions that caused *or contributed to* the denial of tenure and/or promotion."

(Tr. 6280) (emphasis added). While, in our opinion, this language casts too broad a net and should have omitted the italicized phrase, it does not constitute reversible error in light of the other instructions given the jury which correctly stated the test for causation established in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977):

"In order to prove his claim the plaintiff must show by a preponderance of the evidence that his association with the C.I.A. was a substantial or motivating factor in the decision to deny him tenure and promotion."

(Tr. 6278). Moreover, by special interrogatory which was answered affirmatively, the jury was asked

"Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?"

them of a rule which should come as no surprise, that is, that conduct which denies a person promotion or tenure because of his private associations violates his First Amendment rights and is accordingly actionable.

Appellants contend that two evidentiary rulings of the court below constituted reversible error: (1) the court's refusal to admit into evidence two outside evaluations of Selzer's scholarship during cross-examination of defendants (who testified that they relied on those evaluations in deciding to vote against Selzer's tenure or promotion), and (2) the exclusion of the evaluations of certain Brooklyn College political science professors who were colleagues of Selzer. The evaluations were prepared by Selzer's expert and fact witness, Professor Dankwart Rustow, and were as laudatory of the other professors as Rustow's evaluation of Selzer.

Appellants argue that the admission of these reports would have demonstrated to the jury the undependability of Rustow's praise of Selzer. These rulings did not constitute an abuse of the trial judge's discretion. Viewing the record as a whole, the trial court's determination, although disappointing to appellants, did not prejudice them. As to the first item, the evaluations in question were admitted in evidence later in the trial, and during summation defense counsel had the opportunity to argue their significance to the jury. As to the second, the materials offered were of marginal relevance. Moreover, although the evaluations were not admitted, defense counsel were permitted the functional equivalent of questioning Rustow about his evaluations of other professors. (Tr. 4552)

Appellants next claim that the district judge erred by failing to charge the jury as to when Selzer's due

process rights attached. However, Selzer did not claim he was denied his due process rights but that his First Amendment rights had been violated, and those rights did not "attach" at a specific time. Accordingly, the charge urged by appellants would have been inappropriate.[2]

We also find to be without merit the contention that the court's charge was insufficient on the subject of Selzer's duty to mitigate damages. Appellants argue that although the judge instructed the jury that,

> "It is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances to prevent the aggravation of such injuries and to effect a recovery therefrom."

(Tr. 6306-07), it was erroneous to refuse to charge the particulars of the responsibility to mitigate. Selzer responds that defendants failed to meet their burden of introducing evidence showing that he did not attempt to mitigate, and that therefore, "probably no charge on mitigation at all was proper." We agree that the charge given was sufficient to apprise the jury of Selzer's duty to mitigate. Without evidence in the record showing that Selzer did not attempt to find employment elsewhere, a further charge was not necessary.

Appellants assert that the trial judge's conduct was so biased and prejudicial as to deny them a fair trial. While it is understandable that in such a lengthy and

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2 Appellants assert that violation of Selzer's due process rights was made an issue in the case by repeated references to those rights by Selzer's counsel during trial. However, the jury was neither charged on the subject, asked to determine, nor did it determine whether Selzer's right to due process had been violated by the procedures used in arriving at the tenure or promotion decisions.

controversial trial, the parties may become convinced that the judge was not acting impartially, our review of the record convinces us that the district judge's rulings and behavior were unbiased and that the trial was fairly conducted.

III.

We turn to the dispositive issue on this appeal.

Appellants claim that the trial court's charge was erroneous in failing to instruct the jury that the principles established in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977) applied to each defendant individually.

In *Mt. Healthy,* the plaintiff, a school teacher, alleged that he was not rehired because of a telephone call he had made to a local radio station concerning a dress code for teachers. The district court found the telephone call to be protected by the First and Fourteenth Amendments and that it had played a "'substantial part'" in the Board's decision not to renew Doyle's employment. Accordingly, it held the plaintiff entitled to reinstatement and backpay. The Supreme Court agreed that the call was constitutionally protected, but vacated and remanded because of the failure to apply the appropriate rule of causation. The Court held that:

> "[i]nitially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District

> Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."

Id. at 287 (footnote omitted).

In the case at hand, the trial court instructed the jury that:

> "If you find that the plaintiff has met [his] burden of proof, then you must determine whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been denied tenure and promotion even if plaintiff's association with the C.I.A. had not been considered."

(Tr. 6278).

The judge then put the following special interrogatory to the jury:

> "Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?"

(App. 119). The jury answered in the negative.

The appellants argue that the charge given was good as far as it went but did not go far enough. They claim that the interrogatory put to the jury was deficient in not asking it to determine whether, as to *each* defendant, his or her decision to recommend against plaintiff's tenure or promotion would have been made even if Selzer had not associated with the CIA. Put another way, the appellants claim that the jury instruction and the special interrogatory actually given were erroneous because they inquired solely as to the

collective actions of the defendants and failed to distinguish the cases of individual defendants. Consequently, they argue, it is impossible to determine whether, if asked, the jury would have concluded that a particular appellant would have acted to cause Selzer's tenure or promotion denial absent his collaboration with the CIA.

Selzer replies that findings as to each defendant are not required for a finding of liability. He contends that *Mt. Healthy* established a test only as to whether the wrongful conduct brought about the alleged injury and has nothing to do with who acted wrongfully.

We agree with the appellants that the charge and interrogatory were insufficient in the circumstances of this case. It is true that *Mt. Healthy* involved only one defendant and that the court did not specify the language to be used in multi-defendant cases. However, there is nothing in the Court's opinion that indicates that the test should not be applied to each defendant individually. To the contrary, the Court's reasoning, which relies primarily on the nature of the decision-making process of "those responsible for the decision to rehire," requires the separate application of the test to each defendant.

> "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of

> those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

429 U.S. at 285-86. We conclude that the *Mt. Healthy* rule of causation is applicable to each defendant separately and cannot be satisfied by a finding as to the defendants collectively.

Accordingly, we hold that each defendant should have been given the opportunity to establish by a preponderance of the evidence that absent Selzer's CIA involvement that defendant would nevertheless have acted in the same way. The failure to charge and interrogate the jury on that point is reversible error.

IV.

Appellants challenge as excessive the trial court's award of attorneys fees in the amount of $433,458.73.[3]

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[3] Appellants also argue that no attorneys fees should have been awarded because Selzer's counsel agreed to represent him without a

In the event that the trial court is again called upon to fix attorneys fees, we are confident it will note, as this Court has recently suggested in *Seigal v. Merrick*, Nos. 79-7420, 79-7444, slip op. at 1867 (2d Cir. March 17, 1980), that any award must be proportionate to the result achieved.

The judgment of the district court is vacated and the case remanded for a new trial.

KAUFMAN, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the majority's decision to reverse the judgment entered for Selzer in the district court,[1] but I emphatically dissent from its decision to remand the case for a new trial. In my view, the majority simply assumes, without deciding, that Selzer's activity is protected by the first amendment.[2] Since a fuller

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fee and he would not have been deterred from pressing his claims without an assurance of payment of his attorneys fees. We find no merit in this contention.

1 Where, as here, a disappointed candidate for tenure seeks money damages, and not reinstatement, from those individuals who considered his qualifications and participated in the decision to deny his application for tenure, I fully agree with the majority that each defendant must be accorded an independent opportunity to prove that he would have voted to deny tenure even if the plaintiff's protected conduct or speech had not entered into his consideration. Determination of which, if any, of the defendants would have voted to deny tenure despite the plaintiff's protected activity should not end the inquiry, however. Rather, the trier should then proceed to determine whether there would have been sufficient opposition to the application, untainted by improper considerations, to have caused the denial of which the plaintiff complains.

2 The district court also failed to resolve whether Selzer possessed a protected interest in his association with the CIA. Following

assessment of the conflicting interests here at issue demonstrates that Selzer's conduct does not merit constitutional protection, I am forced to conclude that the question of appellants' liability should never have been presented to the jury. Accordingly, I would reverse the judgment for the appellee and dismiss the complaint.

Although not expressly set forth in the Constitution, a right of free association has been implied from the freedoms of speech, assembly, and petition explicitly guaranteed by the first amendment. *Elrod* v. *Burns,* 427 U.S. 347 (1976); *Healy* v. *James,* 408 U.S. 169 (1972); *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971). Like these express guarantees, however, the right to associate freely is not absolute, particularly where its exercise conflicts with the duties and responsibilities of a governmental employee. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

In *Pickering,* a public high school teacher was dismissed for publishing a letter in a local newspaper critical of the budget adopted by her employer, the board of education. After balancing the interest of the teacher, as a citizen, in her expression, with the interest of her employer in promoting the efficiency of the

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presentation of the appellee's case, appellants moved to dismiss the complaint arguing, *inter alia,* that Selzer had failed to demonstrate that his involvement with the CIA merited constitutional protection. The district court rejected this argument, stating that the question presented an issue for the jury. But, when the district judge submitted the case to the jury, he neglected to instruct it to determine whether Selzer's association with the CIA merited constitutional protection. In any event, the question presents an issue of law for resolution by the court, and not the jury. *See Bernasconi* v. *Tempe Elementary School District No. 3,* 548 F.2d 857, 862 (9th Cir. 1977).

public services it performed, the Court concluded that the teacher's interest in free expression outweighed the school board's asserted interest in preserving harmonious relations between faculty and administrators. *Pickering, supra,* 391 U.S. at 569-74. *See also Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 414 (1979); *Mt. Healthy City School District* v. *Doyle,* 429 U.S. 274, 284 (1977). In striking the proper balance in future cases, however, the Court clearly suggested that a contrary result would follow if it were shown that an employee's actions actually disrupted close working relations between members of the employer's staff. *Pickering, supra,* 391 U.S. at 570 n.3.

In applying the guidelines laid down by *Pickering,* the courts of this Circuit have looked principally to the disruptive impact of an employee's conduct or speech upon his co-workers. In *Lefcourt* v. *The Legal Aid Society,* 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd,* 445 F.2d 1150 (2d Cir. 1971), a Legal Aid attorney contended that he had been illegally discharged by the Society because he had been openly critical of his supervisors' policies. In rejecting Lefcourt's assertion that his criticisms enjoyed constitutional protection, Judge Lasker noted that the attorney's statements had adversely affected the internal operations of his employer, and could reasonably be presumed to continue to do so in the future. *Lefcourt, supra,* 312 F. Supp. at 1112. Since the Society depended "for its effectiveness on the close cooperation and unfettered communication (often confidential) of its staff and superiors," Judge Lasker concluded that the ill-will and disharmony sparked by Lefcourt's criticisms generated a sufficiently important interest in his employer to justify his dismissal. *Id.* at 1113. *See also Simard* v.

Groton Board of Education, 473 F.2d 988 (2d Cir. 1973).

The importance of a governmental employer's interest in maintaining harmonious, effective working relationships among its employees was only recently emphasized by this court in *Janusaitis* v. *Middlebury Volunteer Fire Department,* 607 F.2d 17 (2d Cir. 1979). Janusaitis, a Vermont firefighter, repeatedly criticized his superiors for mismanagement of the department. A protracted squabble ensued, which finally culminated with Janusaitis's dismissal after he publicly accused town officials of an illegal cover-up. Noting the distinction between the rights of an employee, such as Pickering, who merely expressed her views on the public policies and services of her institutional employer, and the rights of one, such as Janusaitis, whose conduct directly threatened his relations with his immediate colleagues and superiors, we rejected the contention that Janusaitis's charges were deserving of constitutional protection. "Carping criticism and abrasive conduct," we said, "have no place in a small organization that depends upon common loyalty [and] 'harmony among coworkers.'" *Id.* at 26 (citation omitted).

Though the actual impact of an employee's actions upon his colleagues is an important consideration in the balance to be struck, it cannot be accorded dispositive weight. Any number of private associations or expressions may in fact disrupt a small, homogeneous office, or incur the hostility of one's co-workers. But the subjective predilections of a majority of the employees ought not be permitted to justify the imposition of a stifling regime for the remainder. Rather, courts must also consider the intensity of the reaction, its likelihood

of recurrence, and especially the degree to which the activities for which the employee claims protection necessarily affects the proper discharge of his professional responsibilities. The President's National Security Advisor obviously can claim no constitutional right both to serve in his sensitive position, and to moonlight as a newscaster. A postal employee, however, may well have a right to just such an association with the media, particularly where he occupies no position of high trust. In short, courts must determine whether the employee's association is antithetical to the performance of his duties, and to those of his colleagues.

In the instant case, there can be no doubt that Selzer's involvement with the CIA was directly relevant to his application for tenure. Since Selzer had evidently decided to exchange information, covertly, with an intelligence agency, other members of the faculty could reasonably question his commitment to the academic endeavor. Though it may well be debatable whether the course Selzer chose advanced scholarly objectives, there can be no doubt that his decision to pursue such a course was relevant—indeed critical—to an informed appraisal of his qualifications for permanent appointment to the faculty. After all, Brooklyn College was seeking a teacher and a scholar, not an espionage agent.

That Selzer's association with the CIA in fact disrupted the orderly operation of the College and particularly its Political Science Department cannot be gainsaid. From the moment word of Selzer's involvement with the agency first circulated among Department members until a decision upon his tenure application was finally reached, it appears the Department transacted little other business than to deal with the tempest created by his activities.

But more to the point, Selzer's conduct was inherently disruptive. Professional respect and mutual trust are essential to the vitality of an intellectual community. The unrestrained interchange of ideas, so necessary for the advancement of human knowledge and understanding, presupposes a commonality of scholarly purpose as well as a willingness to extend, and keep, confidences. By associating with the CIA, Selzer cast doubt upon his scholarly goals and principles. The nature of his association contravened what many colleagues considered to be an acceptable norm of academic behavior, and its likely effect was to inhibit them in their relations with him. Moreover, in refusing to disclose the manner and extent of his involvement with the agency, even after his CIA contact had expressly advised him that he was free to do so, Selzer exhibited a disturbing reluctance to share, and keep, personal confidences. Particularly where, as here, the very nature of his association posed an obvious threat to the scholarly pursuits, both of the College and of his colleagues,[3] Selzer's obstinate refusal to discuss his involvement with the agency evidenced a disdain for his peers that quite naturally evoked in them a similar aversion for him. Although the

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3 Before Selzer first contacted the CIA, he asked a colleague in the Political Science Department, Herbert Weiss, for the names of individuals in Europe who might assist him in his research into Nazi war collaborators. Weiss gave Selzer the name of a close friend in Belgium. Subsequently, after the possibility of Selzer's involvement with the CIA became generally known, Selzer informed the members of the Political Science Department that, if he had any contact with the CIA, it was solely to relay information imparted to him overseas. Though Selzer also stated that he would never compromise his colleagues "by imparting any information they had revealed to [him] or which any source to whom they had directed [him] had revealed to [him]," his refusal to admit the fact of his association with the CIA obviously discredited his assertions.

Department's agitated response was by no means beyond reproach, it was certainly predictable. This is particularly so in view of the "critical importance" of the tenure decision that was about to be made *See Simard, supra,* 473 F.2d at 996.

Courts, of course, must stand ever vigilant lest public employers attempt to mask unwarranted inroads upon an employee's constitutional freedoms under the rubric of disharmony and employee dissension. In the instant case, however, I fail to see how Selzer's conduct could be anything but disruptive and counterproductive to the legitimate ends of his employer. In such circumstances, I believe the appellants' strong interest in preserving collegiality and productive relationships among the Brooklyn College faculty must carry the day, particularly if the goal of affording students a challenging, uninhibited education is to be realized. Accordingly, I would reverse the judgment for Selzer and dismiss the complaint.

Special Verdict, Returned May 18, 1979

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 77 C 1897

MICHAEL I. SELZER

Plaintiff,

—against—

MORTON BERKOWITZ, et al.

Defendants.

SPECIAL VERDICT

Directions: Your answer to each question must be unanimous.

In order to answer "Yes" to any interrogatory you must find unanimously that the evidence preponderates in favor of a "Yes" answer.

If you unanimously conclude that the evidence does not preponderate in favor of a "Yes" answer, to any interrogatory, you will answer that interrogatory "No".

Your foreman is to date and sign the last page of these Interrogatories at the place indicated.

Special Verdict

Interrogatory 1

Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?

Yes ✓ No _____

If your answer is "No", you must return a verdict for the defendants and you need not answer any further interrogatories.

If your answer is "Yes", you must answer Interrogatory 2.

Interrogatory 2

Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?

Yes _____ No ✓

If your answer is "Yes", you must return a verdict for the defendants and you must not answer any further interrogatories.

If your answer is "No", you must continue with Interrogatory 3 and those which follow.

Special Verdict

Interrogatory 3

(a) If your answer to Interrogatory 1 is "Yes" and to Interrogatory 2 is "No", which, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation, of that result:

	Yes	No
Berkowitz	√	
Strum	√	
Frey-Wouters	√	
Fleisher	√	
Kahan	√	
Weiss	√	
Engler	√	
Abbott	√	
Schmukler	√	
Reich	√	
Kneller	√	
Kibbee	√	

(b) For each defendant, if any, with respect to whom your answer above is "Yes" please state whether that defendant has proved by a preponderance of the evidence that he(she) reasonably and in good faith believed at the time that he(she) was acting in the fulfillment of his(her) responsibility as a public school employee when he(she) took the action that he(she) did and did he(she) by a preponderance of the evidence prove that he(she) did not take any action with malicious intention to cause a deprivation of constitutional rights or other injury to the plaintiff.

Special Verdict

	Yes	No
Berkowitz	—	✓
Strum	—	✓
Frey-Wouters	—	✓
Fleisher	✓	—
Kahan	—	✓
Weiss	—	✓
Engler	—	✓
Abbott	✓	—
Schmukler	✓	—
Reich	✓	—
Kneller	✓	—
Kibbee	✓	—

(Please proceed to Interrogatory 4.)

Interrogatory 4

Did plaintiff prove, by a preponderance of the evidence, that two or more defendants motivated by a class based animus conspired together to punish plaintiff for his association with the CIA, by seeking to have him denied tenure or promotion, that pursuant to such conspiracy one or more of such persons performed an affirmative overt act or acts in furtherance of such conspiracy, and that, as a result thereof, plaintiff's association with the CIA became a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?

Yes_____ No ✓

(Please proceed to Interrogatory 5)

Special Verdict

Interrogatory 5

If your answer to Interrogatory 4 is "Yes", did any of the following defendants initiate, subsequently knowingly join in or knowingly act in furtherance of the conspiracy?

	Yes	No
Berkowitz	___	___
Strum	___	___
Frey-Wouters	___	___
Fleisher	___	___
Kahan	___	___
Weiss	___	___
Engler	___	___
Abbott	___	___
Schmukler	___	___
Reich	___	___
Kneller	___	___

(Please proceed to Interrogatory 6)

Interrogatory 6

If your answer to Interrogatory 4 is "Yes", did plaintiff prove, by a preponderance of the evidence, that any of the following defendants (1) had actual fore-knowledge or should reasonably have known of the intended results of

the conspiracy, (2) had the power, by exercising reasonable diligence, to prevent or aid in preventing those results, and (3) neglected or refused to do so?

	Yes	No
Berkowitz	___	___
Schmukler	___	___
Reich	___	___
Kneller	___	___
Kibbee	___	___
Board of Higher Education	___	___

(Please proceed to Interrogatory 7)

Interrogatory 7

If your answer to Interrogatory 3(b) includes one or more "No's" and/or your answer to Interrogatory 4 is "Yes" what do you find to be the present value of plaintiff's salary as a tenured faculty member at Brooklyn College from September 1, 1978 to the end of his working life and his pension benefits thereafter, taking into consideration the promotions and raises which he could reasonably be expected to receive?

$330,000.00

When you calculate damages you should assume that plaintiff would have been employed at Brooklyn College from September 1, 1978 until his retirement at age 65 (in the year 2006) and that plaintiff would have received a

pension at half his pay at retirement from that date for so long as he continued to live.

(Please proceed to Interrogatory 8)

Interrogatory 8

If your answer to Interrogatory 3(b) includes one or more "No's" and/or your answer to Interrogatory 4 is "Yes", please fix a dollar amount for such other losses as you find that the plaintiff has already sustained or that he is likely to sustain in the future as the proximate result of the acts which were taken by defendants to punish plaintiff for his association with the CIA.

$250,000

(Please proceed to Interrogatory 9)

Interrogatory 9

As to each defendant with respect to whom you answered "Yes" in response to Interrogatory 6, please state the amount, if any, of plaintiff's damages set forth in answer to Interrogatories 7 and 8 which flowed from acts which that defendant, by reasonable diligence, could have prevented.

Berkowitz ..... $ _____

Schmukler ..... $ _____

Reich ..... $ _____

Kneller ..... $ _____

Kibbee ..... $ _____

Board of Higher Education ..... $ _____

(Please proceed to Interrogatory 10)

Special Verdict

Interrogatory 10

Against which defendants listed below, if any, should punitive damages be awarded and in what amount in each such instance:

	Yes	Amount	No
Berkowitz	____	$____	✓
Strum	____	$____	✓
Frey-Wouters	____	$____	✓
Fleisher	____	$____	✓
Kahan	____	$____	✓
Weiss	____	$____	✓
Engler	____	$____	✓
Abbott	____	$____	✓
Schmukler	____	$____	✓
Reich	____	$____	✓
Kneller	____	$____	✓

Dated: May 18, 1979

RICHARD L. MALLORY

_____

Foreman

Memorandum and Order
Filed October 4, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 77 C 1897

MICHAEL I. SELZER,

Plaintiff,

v.

MORTON BERKOWITZ, PHILLIPA STRUM, ELLEN FREY-WOUTERS, MARTIN FLEISHER, MICHAEL KAHAN, HERBERT WEISS, ROBERT ENGLER, DAVID W. ABBOTT, NATHAN SCHMUKLER, DONALD R. REICH, JOHN W. KNELLER, and HAROLD M. JACOBS, Chairman, and EDITH B. EVERETT, RONALD T. GAULT, JACK JOHN OLIVERO, DAVID Z. ROBINSON, PATRICIA CARRY STEWART, LORETTA A. CONWAY, WALTER H. CROWLEY, ARMAND D'ANGELO, GURSTIN D. GOLDIN, ALBERT V. MANISCALCO, DAVID VALINSKY, EMANUEL R. PIORE, JOAN B. MAYNARD, JOAQUIN RIVERA and EDWARD A. ROBERTS, Members of the Board of Higher Education of the City of New York, and ROBERT J. KIBBEE, Chancellor of City University of New York,

Defendants.

PLATT, District Judge.

I

Defendants moved, pursuant to Rule 50 of the Federal Rules of Civil Procedure ("FRCP"), for an order granting defendants judgment notwithstanding the verdict or,

in the alternative, pursuant to Rule 59 FRCP, for a new trial on the grounds that:

1. The verdict was contrary to the law and the evidence;

2. The verdict was excessive in amount and not supported by the evidence;

3. Defendants were prejudiced by opposing counsel's references in summation to a recent, highly publicized, jury damage award;

4. The verdict was inconsistent with the responses to Special Interrogatory 3(b);

5. The testimony and evidence presented at trial was insufficient as a matter of law, to support plaintiff's burden of proving constitutionally protected conduct was involved.

Defendants' aforesaid motions are denied. No opinion.

II

Subsequent to making the aforesaid motions, defendants moved, pursuant to Rule 62(b) FRCP, (a) for an order staying the enforcement of judgment heretofore entered on May 18, 1979 pending a decision on defendants' aforesaid motion under Rule 50 FRCP for judgment notwithstanding the verdict and (b) for an order directing plaintiff to vacate and/or withdraw all notices filed or served pursuant to the New York Civil Practice Law and Rules "to effectuate the enforcement of said judgment". By reason of a stipulation dated and So Ordered September 28, 1979, made between the attorneys for the parties, this second motion is now moot.

III

By Notice of Motion served within seven days of the original judgment entered herein, plaintiff moved pursuant to Rule 59(e) FRCP for an order (a) amending the judgment so as to provide for injunctive relief granting the plaintiff promotion from assistant to associate professor and granting plaintiff tenure in the City University of New York, and pursuant to Rules 59(e) and/or 54(d) of FRCP and Title 42 U.S.C. § 1988 for an order (b) amending the judgment so as to grant plaintiff costs, including reasonable attorneys' fees and expenses.

(a) Thereafter, because of the defendants unwillingness to negotiate appropriate injunctive relief in the premises, plaintiff withdrew the first portion of his motion and pursued only the second half thereof, i.e., his motion for reasonable attorneys' fees and expenses.

(b) With respect to the latter, plaintiff's attorneys filed a detailed affidavit, defendants applied for and were granted extensive depositions and other discovery, and a hearing was held by the Court on (i) the issue of whether plaintiff was entitled to attorneys' fees and expenses and (ii) the issue of the reasonableness of plaintiff's attorneys' request therefor.

By way of background, plaintiff commenced his lawsuit herein on September 23, 1977, alleging violations of 42 U.S.C. §§ 1983, 1985(3) and 1986, ultimately charging that defendants violated plaintiff's constitutional rights by causing or contributing to the causation of the denials to plaintiff of tenure and promotion at Brooklyn College on account of plaintiff's associating with and speaking to the CIA. The original verified complaint consisted of

four counts and was 29 pages in length. Thereafter, the complaint was twice amended and supplemented, one of such amendments taking into account the opinions in *Monell* v. *Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Turpin* v. *Mailet,* 579 F. 2d 152 (2d Cir. 1978), *vacated sub nom. City of West Haven* v. *Turpin,* 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978), *aff'd on remand,* 591 F.2d 426 (2d Cir. 1979).

Pretrial discovery was, to put it mildly, extensive, both in terms of document discovery and in terms of the number and length of the depositions which were required. During the course of the litigation defendants brought two motions to dismiss; this Court's decision on the first of such motions is reported in 459 F.Supp. 347 and its decision on the second of such motions was tentatively indicated at the outset of the trial on March 15, 1979 (before the issues contained therein were mooted by the jury verdict). The trial itself commenced on March 19, 1979, and lasted for nine weeks. The verdict was rendered on May 18, 1979. Sixty three witnesses were called and some 372 exhibits were marked into evidence.[1]

Plaintiff's attorneys kept detailed time records of the time actually spent in counseling the plaintiff prior to the institution of the litigation, in the preparation of the complaints, in the pretrial discovery, in the briefing and argument of the motions, and in the preparation for and the conduct of the trial, the post-trial motions and other post-trial work. They applied their normal billing rates of approximately $125 per hour for partners time and between $27.25 to $65 per hour for associates time and various other

1. Plaintiff offered some 202 of which 140 were received in evidence; defendant offered 268 of which 232 were admitted into evidence.

lesser rates for other summer associates, student interns and paralegal times (herein sometimes "para-attorney" times). The total attorney hours (attorney and para-attorney) on this case came to 7,599.50 and the total value of all such time amounted to $438,968.88.

The jury's verdict found (i) that all of the defendants, with the exception of the Board of Higher Education and its members, had considered plaintiff's association with the CIA in the determination to deny plaintiff's tenure and promotion, (ii) that such consideration was a substantial and motivating factor therein, (iii) that all of such defendants "knowingly acted in such a way as to cause, or contribute to the causation, of that result" and (iv) that defendants had failed to prove that the plaintiff would have been denied tenure and promotion in the absence of such consideration.

All of the defendants raised the defense of qualified immunity by reason of their alleged good faith. The jury found that six defendants had proved their entitlement to this defense and that six individual defendants had not acted in good faith and the jury rendered a verdict and the Court entered a judgment against the latter six in the amount of $580,000.

In addition to all of the foregoing, plaintiff incurred disbursements and expenses in the amount of $60,065.83.

(i) On the first issue indicated above, namely, whether plaintiff is entitled to an award of reasonable attorneys' fees and expenses herein, § 1988 of Title 42 of the United States Code provides in part that:

> "In any action or proceeding to enforce a provision of sections . . . 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

As plaintiff's attorneys point out in their memoranda, Congress clearly intended that successful plaintiffs in actions brought under the Civil Rights Acts of 1871 should be able to recover attorneys fees just as successful plaintiffs are entitled to recover such fees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3 and 2000e-5(k)) and § 402 of the Voting Rights Act Amendments of 1975 (42 U.S.C. § 1973*l*(e)).

In a Senate Report in support of 42 U.S.C. § 1988 (Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 5908, 5912) the standard for awarding fees was described as follows:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by [42 U.S.C. § 1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)".

Defense counsel seems to suggest that plaintiff in the case at bar should not be entitled to recover any attorneys fees because he prevailed on only one of his theories of recovery and only in money damages as against some of the individual defendants. Defense counsel either misunderstand or are deliberately attempting to confuse the clear answers given by the jury to the special interrogatories propounded to them in connection with their verdict. The jury specifically found that all the defendants (except the members of the Board of Higher Education) caused or contributed to the causation of the deprivation of plain-

tiff's civil rights and thus that they violated 42 U.S.C. § 1983 and the jury further specifically found that the defendants failed to prove that the plaintiff would have been denied tenure had the CIA matter not arisen. In short, plaintiff was and is entitled to full injunctive relief herein and would have received the same had he not withdrawn his request therefor in exchange for the full amount of the damages awarded to him by the jury. The fact that he recovered only on his § 1983 claim and not on his claims based on other sections of Title 42, is wholly immaterial and irrelevant to the question of his entitlement to recovery of attorneys fees.

Defendants argue further that this is not the type of case in which attorneys fees should be awarded and that plaintiff's counsel initially undertook this matter *pro bono publico* and hence no award should be made for attorneys fees herein.

In principle, this case is indistinguishable from *Stolberg* v. *Members of the Board of Trustees for the State Colleges of the State of Connecticut,* 474 F.2d 485, 490 (2d Cir. 1973). There the plaintiff, who had been denied tenure because of his opposition to the Vietnam War and because he had written letters protesting dismissal of faculty members of another college, predicated his claim upon the violation of his First Amendment rights. In that case the Second Circuit reversed that portion of the District Court's judgment as denied an award of attorneys fees (474 F.2d at 490):

> "[T]he objective [of awarding reasonable attorneys' fees] is to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the pros-

> pect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants. • • •
>
> • • • • • •
>
> "The circumstances of this case persuade us that an award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication of their rights to do so in a court of law."

Similarly, in *Rabinovich* v. *Nyquist*, 74 Civ. 1142 at n. 2 (EDNY, May 9, 1979), Chief Judge Curtin (sitting by designation) disposed of defense counsel's *pro bono publico* argument in the following language:

> "[I]n response to the plaintiff's original motion for fees, the state filed a lengthy brief raising a number of arguments in opposition. Many of these were frivolous, such as the argument that attorneys who represent individual *pro bono publico* are not entitled to fees."

In view of all of the foregoing and all of the facts and circumstances herein, there is no question in this Court's mind that the plaintiff is entitled to recover his attorneys fees and disbursements in this action.

(ii) There are numerous factors which the courts have indicated a trial judge should take into account in determining the amount that should be awarded. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit listed the following:

(1) The time and labor required.

(2) The novelty and difficulty of the questions.

(3) The skill requisite to perform the legal service properly.

(4) The preclusion of other employment by the attorney due to acceptance of the case.

(5) The customary fee.

(6) Whether the fee is fixed or contingent.

(7) Time limitations imposed by the client or the circumstances.

(8) The amount involved and the results obtained.

(9) The experience, reputation, and ability of the attorneys.

(10) The "undesirability" of the case.

(11) The nature and length of the professional relationship with the client.

(12) Awards in similar cases.

In the same report referred to above, the Senate Committee stated that:

> "It is intended that the amount of fees awarded [under 42 U.S.C. 1988] be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. . . . In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'"

The Court has taken into consideration all of the foregoing factors and the above-quoted admonition by the United States Senate in its determination of the amount of the fees to be awarded in this case.

Engaging in what might be called "Monday morning quarterbacking" defense counsel suggest that not all of the work done by plaintiff's attorneys was necessary for the prosecution of this matter to a successful conclusion and that if a single practitioner had undertaken the task the same result could have been achieved at far less cost and expense. This Court, however, is not prepared to accept any such hypothesis. Defense counsel themselves consisted of a team of three lawyers from the Corporation Counsel's office and a lawyer from The Board of Higher Education, all of whom appeared to be actively engaged throughout the trial in their unsuccessful defense of plaintiff's meritorious claims. It ill behooves defense counsel under such circumstances now to argue that one attorney could have achieved the same result on behalf of the plaintiff and that they should not have to pay for a comparable number of attorneys working against them throughout the litigation.

Assuming the time was necessarily expended[2] in the successful prosecution of the action, it is, as a practical matter, wholly irrelevant whether one attorney spent the total hours involved or several attorneys and para-attorneys did, as was the case with plaintiff's attorneys. According to plaintiff's attorneys records, they spent 5,481.25 hours of attorneys' time plus 2,118.25 hours of para-attorney[3] time.

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2. Defendants have not produced any evidence (as distinguished from argument) that it was not and, in light of plaintiff's proof, the Court finds that it was.

3. "Para-attorneys," consisting of summer associates, student interns and paralegals, perform, for the most part, work that has traditionally been done by lawyers, e. g., digesting depositions, collating, marking and indexing exhibits, preparing and arranging for service of subpoenas, etc. To the extent that such work is done by non-lawyers at lower time rates than would have been the case had the work been done by lawyers, the losing party benefits and has little cause to complain.

In accordance with their time charge rates, such time has a total value of $438,968.88. At $60 an hour, a single practitioner would receive approximately the same amount.[4]

The Court therefore is not persuaded by defense counsel's arguments that plaintiff is not entitled to the amounts claimed; nor is it persuaded that the hourly rates charged by plaintiff's attorneys for partners, associates and paraattorneys time are unreasonable. Indeed, in light of comparable charges made by firms of plaintiff's law firm's stature and reputation, the stated time charges appear to be most reasonable and indeed, if anything quite modest.

The Court is not convinced, however, that plaintiff's attorneys should be entitled to their time charges in connection with the preparation and presentation of the instant motion for attorneys fees and has therefore deducted the same from the amount awarded herein.

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4. The Court is aware of the fact that at least one Court in a patient infringement action disallowed under 35 U.S.C. § 285 charges for services of law students and law school graduates who had not been admitted to practice in its award of reasonable attorneys fees in that "exceptional case" to the prevailing party saying that such charges were neither proper as "attorney fees" nor as separately stated costs and disbursements. *CTS Corporation* v. *Electro Materials Corp. of America,* 476 F.Supp. 144 (S.D.N.Y. 1979).

In the instant case, as indicated in the text, the statute here (42 U.S.C. § 1988) provides for "a reasonable attorney's fee." In this Court's view, however, the hourly rates for various personnel within a law firm merely serve as a guide in the determination of what constitutes such a "reasonable" fee. As also indicated in the text if a single practitioner had spent 7,599.50 hours on this case and the Court had determined his average time rate for legal, semi-legal and administrative work to be $60 an hour, he would have been entitled to an award of $455,970.00 or some $17,000 more than is claimed by the plaintiff here. In other words, and in short, a reasonable attorneys' fee for the work done in the case at bar appears, if anything, to be in excess of the amount claimed.

Accordingly, plaintiff is entitled to and is hereby awarded recovery of reasonable attorneys' fees in the amount of $433,458.73 and disbursements in the amount of $60,065.83 and the judgment shall be amended so as to award him the same, together with such other costs as he shall be entitled to herein.

SO ORDERED.

/s/ THOMAS C. PLATT
U.S.D.J.

Original Judgment, Entered May 18, 1979

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

Civil Action File No. 77 C 1897

MICHAEL I. SELZER

—against—

MORTON BERKOWITZ, *et al.*

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas C. Platt, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that The Plaintiff Michael Selzer recover of the Defendants Berkowitz, Strum, Frey-Wouters, Kahan, Weiss, and Engler the sum of FIVE HUNDRED AND EIGHTY THOUSAND DOLLARS ($580,000.00) together with interest and costs when taxed; and that Plaintiff take nothing of Defendants Fleisher, Abbott, Schmukler, Reich, Kneller, and Kibbee.

Dated at Brooklyn, New York, this 18th day of May, 1979.

/s/ RICHARD H. WEARE
Clerk of Court

/s/ BRUCE H. NIMS
By: .....
Deputy Clerk

Amended Judgment, Entered October 4, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action File No. 77 C 1897

MICHAEL I. SELZER,

Plaintiff,

—against—

MORTON BERKOWITZ, *et al.*

Defendants.

JUDGMENT

A Memorandum and order of Honorable Thomas C. Platt, United States District Judge, having been filed on October 4, 1979, ordering that plaintiff is entitled to and is hereby awarded recovery of reasonable attorney's fees in the amount of $433,458.73 and disbursements in the amount of $60,065.83, and directing that judgment shall be amended so as to award plaintiff the same, together with such other costs as he shall be entitled to herein, it is

ORDERED and ADJUDGED that upon the direction of the Court, and amended judgment is hereby entered awarding plaintiff recovery of reasonable attorney's fees in the amount of $433,458.73 and disbursements in the amount of $60,065.83, together with such other costs as he shall be entitled to herein.

Dated: Brooklyn, New York
October 4, 1979

/s/ RICHARD H. WEARE
Clerk of Court

Stipulation of Substitution of Judgment Debtor, Filed November 6, 1979

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action File No. 77 C 1897

MICHAEL I. SELZER,

Plaintiff,

—against—

MORTON BERKOWITZ, *et al.*

Defendants.

STIPULATION OF SUBSTITUTION OF JUDGMENT DEBTOR

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the City University of New York (C.U.N.Y.) is hereby substituted as the judgment debtor in the above-captioned action for the purpose of making payment of any and all judgments, costs, fees and interest which have or may be granted or awarded to plaintiff, Michael Selzer, or to his counsel, Donovan, Leisure, Newton and Irvine, in connection herewith as against any named defendant, under the following terms and conditions:

1. That such substitution in no way affects the assertion of any claim or defense which might be available to any party herein in any further proceeding in this matter;

2. That such substitution is in no way to be construed as an admission of violation of law;

Stipulation of Substitution of Judgement Debtor

3. That the plaintiff agrees to withdraw forthwith any and all Restraint Notices served or filed pursuant to the New York Civil Practice Laws and Rules;

4. That the plaintiff agrees to vacate the filing of any and all judgments and transcripts or abstracts thereof against the individual defendants in any county of the State of New York, or of any other state, and specifically, agrees to vacate forthwith any such filings in the counties of New York, Kings and the Bronx;

5. That neither the plaintiff nor his attorneys will demand that CUNY post a supersedeas bond in order to obtain a stay of enforcement of any judgment that has been or may be entered herein, during the pendency of any further proceedings herein;

6. That upon any money judgment in favor of plaintiff or of his attorneys becoming final and unappealable, CUNY will not seek to delay payment beyond the time reasonably necessary to process satisfaction of such judgment; and

7. That under the terms and conditions of this agreement this substitution be made on October 23, 1979 as ratified by the Board of Trustees of CUNY and so ordered by this Court.

Dated: New York, New York
October 23, 1979

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Defendants

By /s/ PATRICK F. X. MULHEARN
Patrick F. X. Mulhearn
Assistant Corporation Counsel

Stipulation of Substitution of Judgement Debtor

DONOVAN, LEISURE, NEWTON and IRVINE
Attorneys for Plaintiff

By /s/ WALTER L. STRATTON
Walter L. Stratton
A Member of the Firm

SO ORDERED: 11/5/79

/s/ THOMAS C. PLATT
Thomas C. Platt, U.S.D.J.

Order of the Court of Appeals, Filed November 7, 1980

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of November, one thousand nine hundred and eighty.

79-7776

MICHAEL I. SELZER,

Plaintiff-Appellee,

v.

MARTIN FLEISHER, DAVID W. ABBOTT, NATHAN SCHMUKLER, DONALD R. REICH, JOHN W. KNELLER, and HAROLD M. JACOBS, Chairman, and EDITH B. EVERETT, RONALD T. GAULT, JACK JOHN OLIVERO, DAVID Z. ROBINSON, PATRICIA CARRY STEWART, LORETTA A. CONWAY, WALTER H. CROWLEY, ARMAND D'ANGELO, GURSTIN D. GOLDIN, ALBERT V. MANISCALCO, DAVID VALINSKY, EMANUEL R. PIORE, JOAN B. MAYNARD, JOAQUIN RIVERA and EDWARD A. ROBERTS, Members of the Board of Higher Education of the City of New York, and ROBERT J. KIBBEE, Chancellor of the City University of New York,

Defendants,

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellants.

Order of the Court of Appeals

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee and by counsel for defendants-appellants,

> Upon consideration by the panel that heard the appeal, it is Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

No. 80-1335

FILED
APR 13 1981
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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of Counsel.

No. 80-1335

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

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MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in granting a new trial on the ground that the District Court's charge was erroneous in failing to instruct the jury that the

principles set forth by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) applied to each defendant individually?

2. Whether this Court's decision in Owen v. City of Independence, 445 U.S. 622 (1980), mandates a judgment against respondent Board of Higher Education?

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STATEMENT OF THE CASE

Respondents strongly disagree with some of the petitioner's characterizations of the pertinent facts. There are numerous instances, as noted by our brief to the Court of Appeals, in which the trial transcript contains conflicting testimony relating to certain occurrences described by petitioner. However, for the purposes of this brief in opposition, and in light of Rule 22 of this Court which states that "a brief in opposition shall be as short as possible," it is unnecessary to counter petitioner's characterization of the facts.*

*On February 5, 1981, the individual defendants and the Board of Higher Education of the City of New York filed a petition for a writ of certiorari seeking to have this Court review the portion of the majority opinion of the Court of Appeals which concluded that Selzer's activity was protected by the First Amendment and therefore Selzer's complaint stated a cause of action. Dkt. No. 80-1332.

REASONS FOR DENYING A WRIT OF CERTIORARI

POINT I

THE PLAINTIFF'S PETITION SHOULD BE DENIED. THE COURT OF APPEALS PROPERLY HELD THAT THIS COURT'S DECISION IN MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977) REQUIRES THAT THE PRINCIPLES OF MT. HEALTHY MUST BE APPLIED TO EACH DEFENDANT INDIVIDUALLY.

The Court of Appeals properly determined that the district court's charge to the jury had failed to apply to each individual defendant the principles established by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), in this multi-defendant trial. In holding that this failure by the trial court to question the jury as to whether each individually sued defendant would have voted to deny plaintiff tenure

absent his Central Intelligence Agency (C.I.A.) association required a remand for a new trial, the Court of Appeals stated (629 F. 2d at p. 814):

> "Accordingly, we hold that each defendant should have been given the opportunity to establish by a preponderance of the evidence that absent Seltzer's CIA involvement that defendant would nevertheless have acted in the same way. The failure to charge and interrogate the jury on that point is reversible error."

Petitioner argues to this Court (Petition, pp. 12-19) that the Court of Appeals erred in remanding for a new trial because the district court's interrogatories to the jury adequately met the Mt. Healthy standard. After the jury found that Selzer's association with the C.I.A. was a substantial or motivating factor in the determination to deny him tenure or promotion, and that the defendants had failed to prove that Selzer

would have been denied tenure or promotion even if his association with the C.I.A. had not been considered, the district court asked Interrogatory 3(a) (Petition; Appendix A22). Interrogatory 3(a) stated:

> [W]hich, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation of that result... [A list of the defendants followed.]*

---

*Defendants' final proposed Special Interrogatories 1 and 2 were the same as Judge Platt's Interrogatories 1 and 2. By comparison, though, defendants' proposed Special Interrogatories 3-5, concerning plaintiff's denial of tenure, read as follows:

> 3. Which defendant(s) who voted on whether to recommend tenure considered the plaintiff's association with the CIA to be a substantial or motivating factor in the decision to deny Michael Selzer tenure? [A list of defendants followed].

(footnote cont'd. on next page)

That interrogatory did not aid the jury in determining whether any defendant could have been absolved of 42 U.S.C. §1983 liability because such defendant's decision to recommend against Selzer's tenure or promotion would have been made notwithstanding Selzer's protected conduct. Interrogatory 3(a) improperly included any defendant who

---

* (footnote cont'd. from previous page)

> 4. Which defendant(s) who considered the plaintiff's association with the CIA as a substantial or motivating factor in the decision to deny the plaintiff tenure, would have reached the same decision even had that defendant not considered the plaintiff's mere association with CIA? [A list of defendants followed].
>
> 5. Was the defendant(s)' decision to recommend denial of tenure for the plaintiff the proximate cause of the plaintiff's denial of tenure? [A list of defendants followed].

would have reached the same decision even had that particular defendant not considered plaintiff's C.I.A. association*. A defendant who acted to deny Selzer tenure or promotion, for any reason, can be said to have "knowingly caused or contributed to the causation of that result." There is no §1983 liability, however, when a defendant acts knowingly, if that defendant would have acted the same way for permissible reasons. If a defendant who considered the C.I.A. as a motivating factor would have also voted to recommend denial of tenure or promotion to Selzer based on Selzer's teaching credentials, then that defendant is not liable under §1983, although he knew he was con-

*Petitioner argues that Interrogatory 3(a) incorporates the principle of Mt. Healthy. To accept petitioner's argument would mean that "result" is synonymous with the word "causation."

tributing to a possible resultant denial of tenure or promotion. In answering the interrogatory 3(a), the jury was not required to determine which defendants, if any, would have acted against Selzer even had those defendants not considered the C.I.A. association.

The propriety of the decision of the Court of Appeals is obvious when reviewing the acts of one of the defendants held liable, Robert Engler. One year prior to Selzer's relationship with the C.I.A. becoming known, Engler voted against recommending him for promotion. Based upon Selzer's file, Engler testified that he did not consider Selzer to be academically qualified for promotion. Similarly a year later, Engler, after having reviewed an almost identical file on Selzer, again voted against recommending promotion for Selzer. Engler

would have most likely voted against Selzer's promotion absent the C.I.A. revelation. But Interrogatory 3(a) was not properly fashioned to allow the jury to consider whether Engler, or any other defendant, would have voted against a recommendation for promotion or tenure notwithstanding the C.I.A. controversy. The Court of Appeals' decision remanding the matter for a new trial is correct and conforms with this Court's decision in Mt. Healthy.

POINT II

THIS COURT'S DECISION IN OWEN V. CITY OF INDEPENDENCE, 445 U.S. 622 (1980), DOES NOT REQUIRE A FINDING AGAINST THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. THE PETITIONER STIPULATED THAT THERE WAS NO POLICY, PRACTICE OR REGULATION PROMULGATED BY THE BOARD OF HIGHER EDUCATION RELATING TO THE FACULTY MEMBERS ASSOCIATED WITH THE CIA. IN ADDITION, THERE WAS NO EVIDENCE OF SUCH POLICY OR PRACTICE.

The issues raised in Owen v. City of Independence, 445 U.S. 522 (1980), do not arise until there is a finding of liability against a municipality under the standards established in Monell v. Department of Social Services, 436 U.S. 658 (1978).

There has been no finding of liability made against the Board of Higher Education of the City of New York (BHE). In fact, the cause of action for damages against the BHE,

brought pursuant to 42 U.S.C. §1983, was dismissed by the district court. The plaintiff did not appeal the dismissal of this cause of action to the Court of Appeals. Further, petitioner by his attorney stipulated that there was no policy, practice or regulation concerning a faculty member's association with the C.I.A. promulgated by the BHE. See Appendix B at pp. 17-18. Under such circumstances, petitioner cannot establish the necessary elements for relief under Owen and Monell.

Petitioner urges that his failure to appeal the dismissal of the cause of action against the BHE was not fatal because the BHE was later substituted as a party defendant for the purpose of indemnifying the individual defendants. This argument lacks merit.

After the district court's finding of liability against six individual faculty members, the BHE passed a resolution to indemnify the employees involved. This policy consideration is a matter wholly in the BHE's discretion and has never been a subject of the litigation. A stipulation substituting the BHE as the judgment debtor was entered into by the parties to free the individuals from the threat of liens and restraints on their personal holdings. This stipulation, appended to this brief as Appendix A at p. 13, specifies that it in no way impacts on liability or forecloses defenses otherwise available. The stipulation states that it cannot be viewed as a confession of liability. Similar to an insurance policy, indemnity is a contractual relationship and has nothing to do with civil liability.

CONCLUSION

MR. SELZER'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 8, 1981.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
RICHARD BOWERS,
PATRICK F.X. MULHEARN,
of Counsel.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL I. SELZER,	:	
Plaintiff,	:	STIPULATION OF SUBSTITUTION OF JUDGMENT DEBTOR
-against-	:	
MORTON BERKOWITZ, et. al.,	:	77 Civ. 1897 (T.C.P.)
Defendants.	:	

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the City University of New York (C.U.N.Y.) is hereby substituted as the judgment debtor in the above-captioned action for the purpose of making payment of any and all judgments, costs, fees and interest which have or may be granted or awarded to plaintiff, Michael Selzer, or to his counsel, Donovan, Leisure, Newton and Irvine, in connection herewith as against any named defendant, under the following terms and conditions:

1. That such substitution in no way effects the assertion of any claim or defense which might be available to any party herein in any further proceeding in this matter;

2. That such substitution is in no way to be construed as an admission of violation of law;

3. That the plaintiff agrees to withdraw forthwith any and all Restraint Notices served or filed pursuant to the New York Civil Practice Laws and Rules;

4. That the plaintiff agrees to vacate the filing of any and all judgments and transcripts or abstracts thereof against the individual defendants in any county of the State of New York, or of any other state, and specifically, agrees to vacate forth-

with any such filings in the counties of New York, Kings and the Bronx;

5. That neither the plaintiff nor his attorneys will demand that CUNY post a supersedeas bond in order to obtain a stay of enforcement of any judgment that has been or may be entered herein, during the pendency of any further proceedings herein;

6. That upon any money judgment in favor of plaintiff or of his attorneys becoming final and unappealable, CUNY will not seek to delay payment beyond the time reasonably necessary to process satisfaction of such judgment; and

7. That under the terms and conditions of this agreement this substitution be made on October 23, 1979 as ratified by the Board

of Trustees of CUNY and so ordered by this Court.

Dated: New York, New York

October 23, 1979

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Defendants

BY _____
PATRICK F.X. MULHEARN
Assistant Corporation
Counsel

DONOVAN, LEISURE, NEWTON
and IRVINE
Attorneys for Plaintiff

BY _____
WALTER L. STRATTON
A Member of the Firm

SO ORDERED:

_____
THOMAS C. PLATT, U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL I. SELZER,	:	
Plaintiff,	:	STIPULATION
-against-	:	Civil Action No. 77 C 1897
MORTON BERKOWITZ, et. al.,	:	
Defendants.	:	

IT IS HEREBY STIPULATED AND AGREED by the parties herein, by their undersigned attorneys, that the following facts are not in dispute:

The defendant members of the Board of Higher Education and Chancellor Robert J. Kibbee took no action implementing or executing a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers with respect to persons who speak to, associate or cooperate with the C.I.A. nor did they

act pursuant to any custom of dealing with persons who speak to, associate or cooperate with the C.I.A. at any time relevant to this action.

ALLEN G. SCHWARTZ
Corporation Counsel of
the City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007

By S/S
Assistant Corporation
Counsel

Donovan Leisure Newton &
Irvine
Attorneys for Plaintiff

By _____
A Member of the Firm

No. 80-1335

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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April 17, 1981

No. 80-1335

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

1. Respondents' interpretation of Interrogatory 3(a) (see Brief in Opposition pp. 5-6) is a transparent distortion. The phrase "that result" in Interrogatory 3(a) refers not simply to the denial of tenure and promotion, but to the wrongful denial of

tenure and promotion. This is obvious from a reading of Interrogatories 1 and 2 in conjunction with Interrogatory 3(a).*

---

* Interrogatory 1 reads:

> Did plaintiff prove, by a preponderance of the evidence, that his association with the CIA was a substantial or motivating factor in the determination to deny plaintiff tenure or promotion?
>
> Yes X No _____

Interrogatory 2 reads:

> Did the defendants prove by a preponderance of the evidence that Michael Selzer would have been denied tenure or promotion even if his association with the CIA had not been considered?
>
> Yes _____ No X

Interrogatory 3(a) reads:

> If your answer to Interrogatory 1 is "Yes" and to Interrogatory 2 is "No", which, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation, of that result: [a list of the defendants, followed; the jury checked "Yes" as to each.]

2. Respondents argue that they cannot be held liable to petitioner unless their votes would have been affirmative had Selzer not talked to the CIA. That argument ignores the fact that evidence of non-voting conduct by each of the respondents amply supported the jury's conclusion that respondents' conduct had caused the institutional decision to be based upon impermissible factors. (See Petition pp. 5-8)

3. Respondents ignore the theory by which the Board of Higher Education ("BHE") should be held liable, namely, that the BHE is statutorily charged with making decisions on tenure and promotion. Where the institutional decisions are found to have deprived a plaintiff of his constitutional rights, the BHE is liable. Interrogatories 1 and 2 establish the wrongfulness of the

institutional decisions. Although the BHE delegated the making of those decisions, it cannot thereby avoid liability if those decisions violate § 1983; Owen v. City of Independence, 445 U.S. 522 (1980), makes the BHE strictly liable. That "there was no policy, practice or regulation concerning a faculty member's association with the C.I.A. promulgated by the BHE" (Brief in Opposition p. 10) is irrelevant.*

---

* The absence of a cross-appeal is likewise irrelevant. Since petitioner simply sought affirmance of his judgment against the BHE, a cross-appeal would have been improper. Also irrelevant is the BHE's motivation for being substituted as judgment debtor; contrary to respondents' suggestion (Brief in Opposition p. 11), a judgment is not a contract of indemnity.

CONCLUSION

Petitioner Michael I. Selzer respectfully submits that, for the reasons stated above and in the Petition herein, a Writ of Certiorari should be granted and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Of Counsel:

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April 17, 1981